

[Copy of Charter: A Course, Episode: What's the point of Section 1?]

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Cheryl M.: Hello, and welcome to Charter A Course. A podcast created by the David Asper Center for Constitutional Rights at the faculty of law at the University of Toronto. My name is Cheryl Milne, and I am the executive director of the Asper Center.

Our podcast focuses on Canadian constitutional law and litigation. We will be highlighting the accomplishments of U of T Law's faculty and alumni involved in leading constitutional cases and issues. Each episode will also include a short practice corner, where we talk about the ins and outs of what it means to be a constitutional litigator.

It is our hope that over the course of this episode, whether you are a law student, a lawyer, or just an interested person, that you learn about an aspect of constitutional law and litigation that interests you, so let's get started.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca, and the Mississauga's of the credit.

Today, this meeting place is still home to many indigenous peoples from across Turtle Island, and we are grateful to have the opportunity to work here.

Secondly, I want to acknowledge the creators of our theme music for charter a course.

Constitutional law professor Howie Kislowicz and his co-writer Rob Currie gave us the license to use their constitutional law shanty in exchange for a donation to the Calgary food bank. You will hear more about the background of this song and the constitutional interests of Professor Kislowicz in a future episode.

For today's episode, we begin our exploration of the Canadian charter of rights and freedoms with a conversation about section 1. Which sets out that the rights in the charter are subject to limits, or as the section says, reasonable limits that are demonstrably justifiable in a free and democratic society.

We are privileged to speak with scholar and U of T alumnus Jacob Weinrib. During our practice corner, I will introduce you to constitutional litigator and alumnus Padraic Ryan. To

begin with Professor Weinrib, he completed a combined JD, Ph.D. program at the U of T faculty of law.

He did two post-doctoral fellowships at the NYU School of law, before joining the queen's faculty of law in Kingston, Ontario, where he is now an associate professor. His research focuses on the intersection between legal philosophy and public law.

He has written on section one of the charter in his book, dimensions of dignity, the theory and practice of modern constitutional law. And in the context of Frank versus Canada, a supreme court of Canada decision about voting rights.

Those of us who have studied constitutional law will know that section 1 provides the government with the onus of justifying any infringement of the rights and freedoms conferred by the charter.

With the help of Jacob in this episode, we will explore the meaning and purpose of section one. We will then discuss the implications of the Supreme Court's 2019 decision in Frank v Canada for what is known as the Oakes framework or test.

I will also ask Jacob about how section one might operate when the country is faced with a national emergency, like, for instance, a global pandemic.

So thank you, Jacob, for joining the conversation today. I would like to start off by asking, in your view, what the meaning and purpose of section one is.

Jacob W.: Section one is a giant mystery wrapped in a puzzle, wrapped in an enigma. If you ask Americans what the first amendment means, ordinary people on the street will provide you with a very fulsome explanation.

If you ask Canadians what section one means, they'll be puzzled, baffled, perplexed, and this is true even of law students. So I want to just begin by explaining that there are actually two ways of thinking about the point of a limitation clause or the point of something like section one.

Now the first and simplest way of understanding it is that the point of a limitation clause is simply to limit rights. So on this view, the charter gives rights with one hand and then empowers government to take them back with the other. Rights are something that

government may, and perhaps should consider when it acts, but constitutional rights, at least on this view, have no priority over any other kind of consideration.

And so, any right can be swept away in order to advance any other consideration, whether motivated by majoritarian preference or administrative convenience, or utility, or even by an objective that is discriminatory.

Now all of this is deeply unsettling because it seems to place Canadians in the situation in which one's rights might not be violated by government, but one's rights remain at the mercy of government.

And this was the very situation that the charter seeks to displace. And so we need another way of understanding what the point of a limitation clause is, what the point of section one is. So I've been spending a lot of time at home with my children over the pandemic, and I recently asked my six-year-old Max what the point of section one is.

So I gave him the charter, he read it, and I said, what's the point of section one? Is the point simply to take away the rights? And Max got quite excited, and he said no, that's not it. The point is that there are rules about limiting rights, there are rules about limiting rights.

This is what parenting looks like in a pandemic when other diversions are sadly unavailable; we read the charter and reflect. So what Max was suggesting was that the limitation clause has a principled role to play in the project of rights protection; it doesn't simply give the rights back.

In this idea, it has a long history, so John Humphrey, the Canadian law professor who is in charge of drafting the universal declaration of human rights, once explained, as he put it, that the purpose of a limitation clause is to put some real limits on limitations of the exercise of freedom.

So, in other words, like the point of a limitation clause, it's not to eviscerate the rights but to limit the limits that government may impose on rights. And Oakes, the nemesis of every first-year constitutional law student, it's just a powerful elaboration of this idea of limits on limits.

Oakes imposes limits on the kinds of ends for which government may limit a right. We call this the pressing and substantial objective requirement. Government may limit a right only for the sake of objectives that are pressing and substantial, from the standpoint of the principles of free and democratic society.

Oakes imposes limits on the kind of means through which government may limit a right. Limitations must be rationally connected to the relevant objective and minimally impairing of the right.

And Oakes imposes limits on the extent to which the right may be infringed. The extent to which the right is diminished has to be proportional to the extent that the pressing and substantial objective is furthered.

Cheryl M.: Okay, Jacob, so what do you mean by Oakes? When you say Oakes, I know what that means; anyone doing constitutional litigation or study knows what Oakes means.

But I'm not sure everybody coming across this for the first time would know what you mean by Oakes.

Jacob W.: So Oakes is perhaps the most important judgment in the charter era, issued by the supreme court of Canada. And the reason why it's so important is it lays out the basic architecture for applying section one.

So section one, as you noted earlier, acknowledges that rights are guaranteed, but it denies that rights have absolute strength; it denies that rights may not be limited. And instead, sets out a basic way of thinking about the conditions under which the infringement of a right could be justified.

And what I'm suggesting is that Oakes fits into this broader way of thinking about limitations clause, according to what clauses, according to which the point of the limitations clause is not simply to annihilate the rights, but to impose limits on government whenever it limits rights.

And so, Oakes expresses the idea that even when government seeks to limit a right, it remains constrained by rights. And in particular, Oakes is built around three kinds of constraints.

Constraints on the kinds of ends government may pursue when limiting a right, constraints on the means it may employ, and constraints on the severity to which the right may be infringed.

Cheryl M.: So, in other words, the government has to have a very good reason and some real sort of methodology in terms of limiting rights in order for the courts to allow it? Is that right?

Jacob W.: Exactly. And if the government wants to escape these reasons, wants to escape this stringent justificatory standard, it has to either amend the constitution or resort to using the override if the override at section 33 is available for the particular right in question.

Cheryl M.: So Canada's constitution is often upheld as around the world as sort of a model, and Canadians are pretty proud of it.

But a lot of people don't understand that there is this built-in limit to their rights; they just read the right sections and not this limitation.

Do you think that something analogous to this section one is really necessary for robust rights protection, even if in other constitutions and around the world, are there other examples?

Jacob W.: Sure. So let me take the comparative question first, and then I'll take the sort of the more abstract question. Do you really need section one.

Okay, so on the comparative question, other constitutions in the post-world war ii era have limitations clauses. Some of their limitations clauses are actually modeled on our limitations clause.

The European convention on human rights has limitations clauses; the difference is that those limitations clauses apply to particular sections of the charter, so every right has its own limitation clause.

The charter doesn't work that way; it provides a general limitations clause for the entire constitution. Other constitutions don't have a limitations clause, and the courts have had to invent one.

And so, we need to think about why ideas of justified limitations are so important in constitutional democracies around the world that are committed to taking rights seriously.

So as soon as we recognize that a set of constitutional rights protect the basic moral status or the dignity of each person, we're confronted by a basic challenge. Which is how do those constitutional rights coexist?

How do particular rights fit together in a system of rights protection? And the challenge can be illustrated by familiar ways in which constitutional rights conflict with other constitutional claims.

So sometimes, your rights conflict with the government's duty to respect the rights of others. So, for example, your right to free expression might conflict with the government's duty to protect my privacy, or my reputation, or my right to a fair trial.

And that other times, rights might conflict with something that may be strictly speaking is not a right, but it's an objective that's integral to a rights-protecting constitutional regime.

So, for example, you don't have to think too hard for this example in the present context of the pandemic, my freedom of movement, in association and perhaps religion, might conflict with the government's duty to protect public health in the context of a highly contagious and potentially lethal virus.

Now you might ask, okay, are there alternatives to proportionality? Are there alternatives to the kinds of limits on limits framework that we discussed a moment ago? And there are. There are actually lots of alternatives, but they all stink from the standpoint of robust rights protection.

So let me just take you through a few of the options, and I think that will help us see why courts around the world have turned to something like Oak's proportionality to resolve these conflicts.

So one option is to insist that legislative bodies have the power to resolve conflicts between different constitutional claims by simply determining the scope of rights or shaping the scope of rights in whatever way that legislative body deems appropriate.

Now in this view, rights aren't standards to which legislation must conform; rights are instead simply the products of legislation. Rights are the freedoms you have left over after government enacts its preferences into law.

But this means we're back to the idea that rights cannot actually constrain legislation; they're not actually supreme law.

And this defeats the whole purpose of the charter in subjecting all public authorities, including legislative authorities, to the discipline of rights.

So that suggestion just let the legislature define the scope of the right as appropriate is a non-starter, from the standpoint of the deepest aspirations of the charter, in actually binding the legislature to human rights standards.

There's another option, right? You can insist that rights are absolute in their strength and that they cannot be limited, okay?

So you could avoid having justified limitations altogether, and then you have, of course, a basic problem what do you do when conflicts emerge between competing constitutional claims, the kind we mentioned a moment ago.

Well, I take it you would have to interpret the scope of the right, that is, the protections that the right affords narrowly so that conflicts do not arise between that right and other constitutional claims.

But now you have a problem, right? Instead of interpreting a right to ensure that it offers protections that correspond to the reason for having it, we instead define the scope of each right very narrowly to avoid any possible conflict.

And so, at the end of the day, you pat yourself on the back, rights are absolute in strength, but you've given the game away. Rights are arbitrary because there's no principled basis for the protections that they afford their bearers.

Cheryl M.: And you would just say then that it just erodes the rights, so then you have very few rights. Because as the case law develops, it's going to become narrower and narrower, is that right?

Jacob W.: So the right will become smaller and smaller, and the reason the right will become smaller and smaller and more meaningless is because you're not interpreting the right to secure kinds of protections that the reasons for having the right demand.

You're instead just interpreting protections away in order to avoid conflicts. And so, you might be very proud that the right is not subject to limitations, but what the right protects is small and meaningless.

And so this again it's not a very good way to proceed, although I think many people actually find it attractive, because they're attracted to this idea that rights should be absolute and strength, and haven't actually considered what the implications of this idea are.

Cheryl M.: So let's think about how the Canadian courts actually interpret this Oakes test. So for Canadian law students, the Oakes test is synonymous with the application of section one, and as you've really quite aptly explained.

But do you think the courts see it that way based on their application of section one? In other words, to what extent do courts actually adhere to this Oakes framework?

Jacob W.: Okay. This is a really hard question, and it's a question that I think constitutional law students rightly spend a lot of time thinking about. I said earlier that there are two ways of thinking about a limitations clause.

The first is that the point of a limitations clause is to take the rights away, to eviscerate the rights. And the second is that the point of a limitations clause is to limit the limits, to impose constraints on the limitation of any right.

Now each of these different ways of thinking about the point of a limitations clause gives rise to a different kind of analysis in section one. And if you want like a really handy set of labels for distinguishing these two kinds of analysis, you can't do much better than Oakes classic and diet Oakes.

Okay, so let me just explain what these two approaches are. So Oakes classic extends from the idea that the point of a limitations clause is to impose limits on limits. And as we've discussed, it imposes limits on ends, the kinds of objectives for which rights may be limited, limits on means, the way in which government may constrain a right or restrict a right.

And limits on the extent to which the right may be infringed. And further, Oakes applies a limit to each of these limits.

Namely, the government bears the onus of the text of section one puts it, demonstrably justifying the satisfaction to not demonstrably justifying the limitation.

And so, our courts have interpreted that to mean that government bears the onus of showing that all of the requirements in Oakes are satisfied.

Now the result is that even when the legislature limits rights, it's constrained by rights. Now what we might call diet Oakes elaborates the opposing idea that the point of a limitations clause is simply to take the rights away.

And so diet Oakes, although it uses much of the same language as Oakes, allows rights to be limited for any reason through any means and to any extent. And within this like approach, there's a lot of talk about justification, but justification isn't actually present.

And each of the constraints that classic Oakes imposes are diluted or completely disappear. So instead of meaningful constraints on the ends for which rights can be constrained, there's the idea that a right can be limited for the sake of any objective whatsoever, so long as it reflects a communal need or a communal value, and all legislation seems to do that.

And instead of constraints on means, in the form of rational connection that the rights restricting means have to be rationally connected to the objective that government is seeking, the diet Oakxers speak of a reasonable connection, and government believing that there's a reasonable connection, not demonstrably establish it, but there is such a connection, but just believing that there is one. Instead of a minimal impairment, they speak of reasonable impairment.

And with respect to the final stage of the analysis, what's sometimes called proportionality in its strict sense. Instead of actually examining seriously the severity of the rights infringement and the corresponding gain to the competing objective.

The diet Oakxers instead take the full realization of the competing objective for granted and allow the right to be diminished to any extent.

Cheryl M.: So, in other words, the government is given quite a bit of leeway to limit or trounce on rights to some extent, as long as they have something that fits into a concept of reasonableness and their approach. Is that what you're saying?

Jacob W.: Yes, that's exactly right. So what the court is doing here when it applies this very deferential framework is I take it in part, borrowing very deferential concepts from administrative law and bringing them into the constitutional domain.

And the result of this is that well, Canadians find themselves back at the mercy of government, which may not violate their rights. But whether your rights are restricted is essentially up to them.

Cheryl M.: So on that note, I want to sort of talk about a very specific case and so that we can talk about the way the court approached that. And this is the Frank v Canada case that we mentioned earlier in the episode.

But before we do so, I think I want to briefly kind of set up the facts and the issues in Frank. The applicants were two Canadian citizens who had resided in the United States for more than five years. The applicants had very strong connections to Canada, but the

Canada elections act had eliminated their right to vote because of that five-year duration or over five years.

And so they applied for a declaration striking down that section of the Canada elections act that prevented them from voting, contrary to what is section three of the charter, which is the voting rights section.

So the supreme court of Canada, at that level, the majority found that the applicant section three democratic rights were unjustifiably violated.

And, I just want to put a little plug in here, the Asper center actually intervened in this case, and one of the things that we focused on was really what section three meant in terms of the voting rights.

But there was also a dissenting opinion that would have decided that the violation of this section three right was justified under section one. So you wrote about this in a Supreme Court law review article.

Can you just tell us a little bit about what your analysis of this case was and the way the court approached the section one analysis in particular?

Jacob W.: Okay. The dissent's ambitions, I think, are quite laudable, they want to bring clarity back to Canadian constitutional analysis, so I think they can't be faulted for that. But I think there actually is a real danger to the kind of proposal they're making, and I think that has to be grappled with so that we don't succumb to it.

So the dissent organizing idea is that when it comes to charter adjudication, we've been doing it all wrong.

The charter, the dissent says properly understood; it doesn't justify rights infringements. Instead, it insists that the basic question is whether the scope of a right as determined by legislation is justified. And when the scope of the right is justified, there's no infringement.

And when there is an infringement, the scope of the right is not justified, okay. Now you might be scratching your head, and you might think, okay, now look, life's too short for this, this seems to be just semantics, chief justice Wagner says this is just semantics. You

might think there's no difference in saying with Oakes is the infringement justified or saying with the Frank dissenters, is the scope of the right-justified?

What actually turns on this? Well, it turns out everything depends upon this. There's something dangerous lurking in Frank, and we need to be on the lookout. So with an Oakes classic, section one raises a legal question about justification.

We only proceed to section one if there is something to justify. Now rights are supreme law, and their infringement is presumptively unconstitutional. So an infringement must be justified if it is to stand, and there's a legal analysis about whether that infringement is justified.

Okay, now in contrast, within the Frank dissent's approach to section one, the word justification appears, but there's nothing to justify. The section one analysis proceeds on the basis that the right has been shaped by legislation, not infringed by.

And this simple presupposition transforms the whole analysis by emptying it of all constitutional content. If no right has been infringed, there's no reason to insist that government must act to further an objective of constitutional stature, pressing and substantial objective.

Any ordinary consideration or any policy objective will do. And so, the pressing and substantial objective requirement seem to disappear.

And if you look at minimal impairment, it makes no sense to ask at the minimal impairment stage whether there's an alternative mean that's less injurious to the charter right, if the analysis is perceiving on the basis the charter right has been merely shaped, not infringed, not injured at all.

It doesn't make sense to talk about the possibility of a lesser infringement if there's no infringement as such.

And turning to the final stage, if this were Oakes, we would be confronted by competing constitutional claims, a pressing and substantial objective on one side, and a constitutional right on the other.

And here, all we have are two non-constitutional claims. We have the residency requirement, which does not diminish the right. And on the other side, we have

parliaments democratically enacted policy objectives in excluding non-residents from voting.

And so, we've drained the analysis of all constitutional content. And with that, the dissents conclusion follows that this is simply a policy question, and courts have no business getting involved.

So the dissent purports to bring a kind of conceptual clarity to constitutional adjudication in Canada, but what's actually happening is that it's creating a world where it's as though the charter never happened; it's an attempt to return Canadians to this pre-charter world where each person's rights are at the mercy of legislative bodies, that are constrained only by jurisdiction, not by your inherent human dignity.

Cheryl M.: So it's similar to that other example that you gave earlier, where in fact, the rights themselves are getting defined away, and sort of diminished, and the government's powers are to shape them as you say or enact policy is enhanced. So that notion that we have, these robust rights, sort of disappears.

Jacob W.: That's exactly right. It doesn't mean anything to have rights that are guaranteed against legislative bodies if the legislative bodies get to determine what those rights are through legislation.

Cheryl M.: So who were the dissenting judges in the Frank case?

Jacob W.: Justices Cote and Brown.

Cheryl M.: And so they're the ones we need to watch in terms of future cases and interpretation of section one.

Jacob W.: I think that's true. But I think it's. Actually, we need to generalize that. We actually need to watch everyone.

The reason why I say that is because there's been a number of judges in the history of the supreme court of Canada who switch from Oakes classic to diet Oakes, to this Frank approach, which we might call Oak zero, depending on the facts of the case and depending on how much they like the rights.

If they like freedom of religion, they're with Oak's classic. If they don't like equality, they switch to diet Oakes or Oak zero. This is a completely objectionable way to do constitutional analysis because, at the end of the day, there's no law; there's simply the idiosyncratic preferences of the judges you happen to encounter.

And what I'm suggesting is that Oakes classic is a framework that actually applies to all of the rights in a completely principled way, and this is Canada's, I think, foremost contribution to constitutional law and jurisdictions around the world.

We actually have cases that establish the possibility of a general limitations framework that applies to all of the rights in a principled and coherent way.

Cheryl M.: I think the majority in Frank, what I like about it and what's clear and partly because it's democratic rights, which the court really finds quite important and essential to our whole system.

But is that it really did make it clear, though, that the onus is on the government in justifying these limits. And what that means, I mean that's sort of legal language justification onus that sort of thing, it really means that the government has to not just say we want to do this because we think it's okay, or we think that we need to.

They actually have to show evidence, like real reasons why it's necessary to do the things that they have to do.

And that's I think as you say Oakes classic, so putting it down into its simplest terms is that no, if the government wants to limit our rights, they better have a very good reason and actually have evidence about why they have that reason and that they're limiting our rights as little as possible.

So if they're not just kind of trouncing all over them in order to meet their objective, they're actually taking little baby steps to just kind of tweak it, as opposed to eliminating the rights. Is that a fair summation?

Jacob W.: Yes, and I think that goes to the very structure of constitutional adjudication in a regime that takes rights seriously. You have rights; if government wants to limit those rights, it has to provide justification.

And so our going in presumption, our basic default is that rights are supreme law, and limitations of those rights are unconstitutional. Unless, as the court puts it in Oakes, government can satisfy this stringent justificatory standard.

If you lose sight of this idea, and we enter a world in which we have to justify our rights instead of justifying limits on rights, the whole charter is lost.

Cheryl M.: I want to turn now to sort of a final kind of question about Oakes, which is probably the most clear-cut kind of circumstances in which you'd see section one being necessary. So, where you've got the context of a national or even provincial emergency.

And so one of the last supreme courts of Canada decisions that really looked at that was the Newfoundland and nape decision, and N-A-P-E, as was the nape, is the acronym, where the Newfoundland deferred the commencement of a promised increase in wages for the province's female healthcare employees via the public sector restraint act.

So that the cumulative effect of the PSRA was to erase a pay equity obligation of around 24 million dollars. Which actually, in today's terms, doesn't sound like that much money. But it is Newfoundland, a smaller province, and so we need to think about that.

But Newfoundland argued that the legislation was passed out of a necessity in wake of a credit emergency brewing in the province. So they were anticipating this budgetary deficit that had unexpectedly grown; they had a credit rating issue, it was in jeopardy.

And the Supreme Court candidate determined that section nine of that act infringe section 15 of the charter because it was pay equity; it was for women who had been traditionally paid less than they should have.

But they upheld it under section one. So can you talk a little bit about that and about the issue of what is a pressing and substantial objective in the face of what the court then said was a national or, in that case, provincial emergency or necessity?

Jacob W.: Terrific. Okay, so there are different ways of thinking about emergencies in general and fiscal emergencies in particular in terms of the charter. So one view is that when you have an emergency, the constitution is silent.

And this seemed to be the view of the court of appeal in nape. There's a financial emergency, and that requires the courts to defer to the policy choices of a legislative body, and that body decided to delay pay equity.

And this is, of course, totally worrying; whenever Simon says emergency, your constitutional rights vanish.

And government doesn't have to justify that there is an emergency, or that infringing your rights alleviates the emergency, or that the emergency requires limiting your rights to that extent. Simply the word emergency places us in this realm of deference where there are no constitutional standards.

And so, the charter amounts to nothing. Now there's an opposing view that some critics of nape took up, which is that budgetary considerations, however exigent, however extreme, never justify the infringement of a Charter right.

And I find this view worrying as well, because, on this view, rights become a kind of straight jacket that prevents government from responding to emergencies and so perpetuate emergencies.

And emergencies are situations in which rights cannot always be fulfilled to the greatest possible extent. So I think this view with two is a little bit problematic, and we should sort of keep looking. So there's a third view, and this is the view I'm most sympathetic to, which

is that some budgetary considerations can justify limiting rights but not others. And the basic idea here is that constitutional rights are supreme law.

And as such, they have priority over other kinds of non-constitutional claims. This is Justice Wilson's position in *Singh*, and this is a 1985 decision, so this is pre-*Oakes*, but anticipating many of the things that *Oakes* will have to say, particularly about the kinds of objectives for which rights may be limited.

And Justice Wilson in *Singh* holds that the process for identifying refugees was unconstitutional because it denied oral hearings to applicants. And in so doing, violated the section 7 rights of these refugee claimants.

So Justice Wilson explains that if rights mean anything, they have priority over certain kinds of considerations like administrative convenience, utility. And she adds to that non-prohibitive cost.

So the government cannot deny oral hearings to refugee claimants simply because oral hearings are more expensive than written hearings; that wouldn't take rights seriously, right? We don't take rights seriously by expecting every right in every context to be revenue-neutral.

But Justice Wilson also accepts that in the case of prohibitive cost, there is a justification for limiting your right. In principle, we have the kind of objective for which a justification may be presented.

And Justice Wilson's point here seems to be that if the cost was so high that it imperiled the fulfillment of other constitutional responsibilities, the government would have a pressing and substantial objective.

What's alarming about *nape*, at least as I see it, is not the pressing and substantial objective analysis; it's the onus.

So the government's position is that if public funds are to be directed towards pay equity, they have to come from somewhere, namely out of hospitals or schools.

But that just means that one disadvantaged group will be further disadvantaged in order to offset the disadvantage that another group, namely female hospital workers, face.

What's unfortunate in nape is that the court never requires the government to demonstrate that this is actually the case, that there's no other way to provide pay equity except by further disadvantaging members of some other disadvantaged group.

And this unwillingness to have government actually justify, provide evidence is not simply a breach of Oakes, but it breaches the text of section one of the charter, which indicates that limits must be demonstrably justified.

Here, the government simply makes assertions about its budget, and the court says those assertions are good enough for us.

Cheryl M.: At the minimum impairment stage, the court said that when it comes to the distribution of resources in cases such as these, governments have this large margin of appreciation within which to make choices.

And so, there were a number of factors that the court considered. And also, my second question that goes along with that is what are those factors, but the second question is, do you think nape actually waters down the minimal impairment requirement?

Jacob W.: Okay. So with respect to the factors, the court looks to the scale of the crisis, the fact that government explored alternatives to limit the spending, the cost of the pay equity plan, and government's role in mediating between the competing interests of different individuals and groups.

And there are other factors as well. And on the basis of these factors, as you note, the court concludes that the government has a large margin of appreciation. I think nape does water down the minimal impairment requirement.

So let me explain why now the margin of appreciation starts with a good idea. And the good idea is that rights are like pizza, okay stay with me here. We all know there is more than one way to make a terrific pizza.

There are red pizzas and green pizzas and white pizzas, and thin-crust pizzas and thick crust pizzas, and deep-dish pizzas. When it comes to making a successful pizza, there isn't

simply one way to go. It's also true that not everything is a successful pizza; fettuccine Alfredo is not a different way to make a pizza; it's not a pizza at all.

Okay, now that's pizza, and now we have to talk about constitutional rights. The margin of appreciation is the idea that there are many different ways to satisfy rights. And this means we shouldn't regard every variation as a violation.

And so, when legislative bodies choose how to satisfy a right, courts should defer to their choice, and that's the margin of appreciation.

Don't second-guess the chef about how to make a successful pizza, don't second-guess legislative bodies when it comes to choosing how to satisfy a right. And this idea of the margin of appreciation it seems plausible enough, but there's actually a very deep problem.

The basic insight is that there are different ways of satisfying rights, and when that's the case, government may choose.

But what's worrying about the margin of appreciation is that we can only say government may choose its preferred course if we've already established that all of the options before it involve variation, not violation.

So we cannot simply say that when the scope of the financial problem is large, and there are different ways of resolving it, the court should defer as it does in *nape*; we have to actually apply the minimal impairment requirement to determine whether there's a less restrictive, a less discriminatory means of achieving the government's objective.

And if there is, we're in the land of violation, not variation, and so deference is inappropriate. And that seems to be the case in *nape*. *Nape* involves a kind of double discrimination against female employees in the health sector.

First, they suffer years of systemic pay discrimination that denied them equal pay for work of equal value. And then, the government delays the remedy of equal pay by pointing out how expensive it will be to address the problem moving forward.

Now for present purposes, we can set aside that the high cost of achieving pay equity is just a reflection of the severity of the discrimination and focus on something else. Newfoundland seeks its objective of budgetary stability that enables it to fund social

programs by delaying equal pay for a group that has already been systematically discriminated against.

And so the same group is being discriminated against, not once but twice. This seems unfair, not just in the abstract sense, but in a sense that minimal impairment catches.

When section one asks whether there's a less restrictive way of realizing the government's objective, the government has to explain why double discrimination against female workers in the health sector is required to achieve its objective.

But the court of nape is so eager to defer on the basis of this margin of appreciation that it never asks this question.

And so, nape takes us a big step away from the kind of regime of equal freedoms to which the charter aspires.

What the margin of appreciation does is it simply creates a situation in which courts defer to the government's view that its policies are justified.

The government becomes judge in its own cause, and the idea that your rights are actually constraints on government disappears.

Cheryl M.: So I want to take us now to bring us up to date to the current sort of national emergency situation that we find ourselves in, and that is the global pandemic.

And there seems to be out there confusion about what the government can do to limit rights during this time.

How do you think the court's interpretation of section one affects pandemic measures that can or have been taken or some of the rhetoric that we've heard from politicians about things they say they can't do, when in fact, maybe they could under section one.

Jacob W.: Okay, I think there's tremendous confusion. And I absolutely agree, and I think that this conversation helps us understand why. We find ourselves in a situation where rights infringements are very real, right?

The pandemic has occasioned previously unimaginable infringements of basic freedoms, religion, association, freedom of movement; it's exacerbated concerns about disadvantage that fall under the equal benefit language in section 15-1, the equality provision.

And at the same time, we have a pressing and substantial objective in mind here, the protection of public health. And all of this raises the question of how courts will respond to the conflict between these basic rights and public health.

And they have two basic options as we've seen, they can say that government can do whatever seems good and right in its own eyes, and invoke this diet Oakes framework, and return Canadians essentially to a pre-charter world.

Or they can say that when government infringes rights, restrictions must actually advance public health. That the measures must be minimally impairing of rights, and that when there are conflicts, the duty of government is to preserve both rights and public health and not allow one to be completely annihilated in order to promote a negligible gain to the other.

And the question like which of these approaches will court adopt does not have a clear answer because what the supreme court has done is it's built up two different theories of section one.

There are a line of cases preaching deference and deference in the context of far less exigent circumstances than we're currently immersed in. And there's a line of cases saying that the constitutional standards set out in Oakes provide the constitutional parameters for the lawful response to any other crisis, and this is a kind of perfect storm.

And laws will stand or fall, depending on whether courts adopt a diet Oakes framework or an Oakes classic framework. I also want to push back, though, against the idea that Oak's classic is so strict that it makes responding to a situation like the pandemic impossible.

So those who want to move to a more deferential diet Oakes framework often say that the strictness of Oakes makes it impossible for government to achieve important objectives. But I think it's important to see how Oakes and, in particular, the final stage of Oakes works.

Oakes doesn't say that government requires conclusive scientific evidence in order to justify the infringement of a right. It merely says that the nature of the evidence must correspond, must be appropriate to the nature of the legal dispute.

And so, in this context, where there is uncertainty, or at least at the beginning of the pandemic, there was uncertainty about how the virus spread, that is not fatal to the government's justification.

And similarly, Oakes calibrates the strength of the justification required by indicating that stronger justifications are required when the infringement of the right is more severe.

So I want to just push back against the idea that Oakes is the kind of straightjacket that precludes a meaningful response to public emergencies. Instead, Oakes is carefully calibrated for the kinds of uncertainty that emergencies often involve.

Cheryl M.: Great, thank you. I just wanted to say we've been listening to Professor Jacob Weinrib talking, explaining the section one limitations clause in our charter of rights and freedoms.

It's not an easy concept to grasp, and we have been talking about different cases that explain how the courts have interpreted even in different approaches. So thank you very much for walking us through that.

Jacob, are there any particular interesting things you're working on right now that you want to tell our listeners about?

Jacob W.: Thanks so much, Cheryl. So I'm currently working on a book about proportionality actually, entitled proportionality, the nightmare in the noble dream. And what I'm trying to do in this book is actually work through many of the themes we've been discussing by trying to understand the relationship between proportionality and human rights.

My claim is that proportionality isn't something that's antithetical to rights, nor is it something that's an unqualified good from the standpoint of robust rights protection. Instead, there's a version of proportionality that's integral to robust rights protection and a version of proportionality that's inimical to it.

And we need to understand the difference between these two approaches so that we can ensure robust rights protection under the charter and under constitutional regimes of rights protection around the world.

Cheryl M.: Thank you very much

Jacob W.: Thank you so much.

Cheryl M.: Thank you, Jacob. We certainly look forward to reading what you have to say, and we encourage our listeners to watch out for your book as well. It's been an absolute pleasure to learn from you today.

Now, we turn to our practice segment of today's episode, where we talk with lawyers about some of the ins and outs of constitutional litigation. I'm pleased to welcome constitutional lawyer Padraic Ryan.

Padraic Ryan has been counsel at the constitutional law branch of Ontario's Ministry of the attorney general since 2014. He previously clerked at the federal court and the constitutional court of South Africa.

Padraic has argued charter, federalism, administrative law, and human rights code cases at all levels of court and advises on constitutional law matters.

He is the co-author of Irwan Law's constitutional law fifth edition, welcome Padraic. As a lawyer working with the government of Ontario, we know that you don't speak for the government.

Padraic R.: Hi Cheryl, thanks so much for having me on. And yes, as you said, I'm only here providing my own personal views, and nothing I say should be attributed to the government of Ontario or the attorney general of Ontario; thank you.

Cheryl M.: So what I hope to cover in this short segment is to give our listeners an inside view of what it is like to develop and present the evidence to support the legal arguments that are made under section one of the charter. We heard from Jacob Weinrib about how it is up to the government to justify limits on charter rights. How do you go about doing that?

Padraic R.: Well, the Supreme Court has said that there's not a particular evidentiary standard that is required under section one of the charter. In some cases, logic and common sense may be sufficient.

And in others, likely where there's a more intrusive violation on charter rights, it would be up to the government to lead evidence in support of the law that's been challenged.

Evidence can mean internal evidence that comes from inside the government, particularly speaking to the purpose of the challenged law or the background work that has been done in government through the policy development stage.

Or it could include experts who in fact are required by the rules of evidence to be completely independent from the parties, and therefore, are providing a more objective view on matters that are sufficiently complex to expert evidence such as social science or maybe even natural sciences, depending on the law. Under internal evidence.

There's no requirement that the government lead this kind of evidence into constitutional challenges. So it's not like an administrative law judicial review, where the government's process and reasons are themselves required to be publicized or entered into evidence.

But it can be helpful, particularly again for establishing the purpose for a law or regulation. Regulations, in particular, are passed by cabinet without answered and legislative statements, and all the sort of extrinsic materials that we associate with parliament, the parliamentary procedure itself, also can be useful there.

Cheryl M.: Yes. I make my students in the Asper center clinic course learn how to do legislative history research as part of preparing for constitutional challenges.

We use the term legislative facts when we're referring to the expert evidence that gets filed in constitutional cases. What does that mean?

Padraic R.: The Supreme Court in *Bedford* distinguished between adjudicative facts, which are only about the case at hand, from legislative facts, which are about society at large.

And a legal proceeding which is concerned only with the validity of a law or regulation of general application is typically going to be only concerned with legislative facts.

Whereas the vast majority of legal proceedings such as a criminal prosecution, a family law dispute are going to be about adjudicative facts, about whether the facts at hand meet us a certain pre-existing legal test.

So, where a constitutional challenge is a sole purpose proceeding to challenge a law like in *Bedford* or *Carter* or many of the classic cases. In fact, legislative facts are the only type of evidence that should be admitted and often.

One thing that the parties fight about is whether one person's experience about the effects of a law of general application are sufficiently legislative, whether they're representative of other people, or whether it's really just one person's experience, which is less likely to be helpful legislative facts.

Of course, there can be proceedings where the constitutional challenge arises in the course of some more typical challenge, such as a criminal prosecution where the defendant wants to challenge the validity of the law they're being prosecuted under.

And then, in fact, you can have both adjudicative facts and legislative facts, and it's up to the lawyers and the court to sort of apply the subset of facts that is relevant to each stage of their determinations.

Cheryl M.: So the experts try and tell us like what is the impact of the law on the public in general? What is the nature of the harm that may be caused by the breach of the charter or the good that the government is trying to create with the law itself?

So it's a pretty significant evidentiary record that has to be put forward. And so, just how important is this material that gets filed with the court?

Padraic R.: I would say that this is the most important decision that's made by lawyers over the course of a constitutional challenge, including subsequent appeals. And that's for a couple of reasons.

One is that it's where there are the most options available to the lawyers in making their decisions, particularly as a government respondent. You could, in fact, decide to leave no evidence at all because the case obviously has no legal merit or the applicant's evidence is so insufficient.

Or once you decide to lead evidence, you could decide to lead internal government evidence, you could decide to lead experts, and there's a huge range of possibilities that are open to you.

So that really is more possibilities that are open to you at the legal argument stage, for example, because although there is creative lawyering, there's really a fixed set of arguments that can be made on either side.

Whereas evidence, it really is up to the extent of a lawyer's creativity and what they consider relevant. The other reason it's the most important is because it's something that the party's lawyers do that can't really be fixed or amended by other participants in the proceedings.

So a judge can always help the side that they think should win, within fact a new legal argument that they've thought of entirely and that the lawyers missed. And those arguments could also come from supporting interveners.

But it's very difficult for either of those participants to create evidence where there isn't any. So if evidence is necessary to establish a certain legal point, it really is up to the party's lawyers who make that decision.

And in fact, in the procedure, we most commonly use in Ontario, which is called an application. The evidence decisions get made before there's an exchange of legal argument at all.

There's really a minimal pleading called the notice of application, and then the very first thing that the lawyers of the parties do is start making those decisions about evidence, which is long before a judge is involved, long before interveners are involved.

And so that's really a very important decision that it's really up to them in their own discretion and judgment to decide what will ultimately provide the record.

And even if the first level judge doesn't admit evidence or has certain views on it, the evidence is really baked by the time you get to an appeal, which is again the decisions that most students read, and that most interveners are involved in, they're dealing with a very fixed record that can only be changed in certain exceptional circumstances.

Cheryl M.: So that first stage, the trial level or the application stage, is the most important. I mean, even though it's up to the government to present the evidence and arguments about why a limit on a right is justified, parties claiming a breach of the charter usually have to file all their evidence upfront, as you were describing.

They have to anticipate what the government might argue in advance. And how does that play out during the course of the litigation?

Padraic R.: I would say the practical answer in my experience is that because we use the application procedure in Ontario, the sequencing of evidence isn't particularly contentious.

Because although the written rule only imagines one round of evidence, where the applicant files theirs and the respondent files theirs. In reality,

it's very common for the applicant to serve reply evidence; for the respondent to serve reply evidence, you can even have three or four rounds of this exchange of evidence before cross-examinations.

And typically, because a judge isn't involved until that entire record is completed, they are very reluctant to get into who served a proper reply versus who went too far in their reply.

And it's more likely that they simply take the record as it is, no matter what the exact sequencing was. And in particular, any procedural unfairness from an improper reply, for example, can always be cured through another round of evidence.

So it's kind of self-remedying, so long as both parties take the same approach. From time to time, I have seen a timetable that specifically provided that will have one round of evidence where the applicant goes first, and the government responds, and then we'll move to section one evidence where the government goes first, and the applicant responds.

And in my experience, those cases have really not proceeded any differently from a normal application, which again, although on paper, has a rule more like a live trial, where sequencing would be very important.

In fact, we often go back and forth many times on evidence, and then cross-examination itself is something that comes after the exchange of affidavits. So that's again different from a trial where the plaintiff would go first, and then an expert would be immediately cross-examined.

And so, the defense has the knowledge of what happened in the cross-examination before they decide about what evidence to respond with. Instead, there's a flurry of exchange of affidavits, and then cross-examination only comes later.

Cheryl M.: So, I strongly believe that all lawyers and judges in these cases have a responsibility to make sure that the best evidence is filed in these cases. And as you've described it, it sounds like there could be lots and lots of material that gets filed as you go back and forth.

And too often, we hear about records that are thousands and thousands of pages long, with sometimes less than authoritative experts put forward. So how can courts or lawyers counter that trend, and or should we?

Padraic R.: Well, for lawyers, the question of volume is a challenging one because we are trained in our profession to be risk-averse. And so our instinct is always to put absolutely everything into the record, in case it becomes relevant later.

And especially, in case there's a question from a decision-maker at a hearing on something that didn't seem particularly important to the lawyers who filed the evidence and maybe didn't even seem particularly important in cross-examinations or in the exchange of factums.

But we only hear from the decision-maker, like an application judge, so late in the process that the instinct is to front-load the procedure and include everything. I'll give you a very simple example, expert reports, just like your student's papers, often include footnotes citing academic articles in their fields.

And the lawyers have to make a practical decision about whether to include every article that is cited or leave it up to the other side to request those articles on cross-examination, which would probably result in fewer pages overall on the record.

And my practice has always been to include absolutely everything because if you get to a court and the judge says, well, what does the article on footnote 13 say? You really want to be able to say, well, your honor, let's flip to tab 55, and the answer is right there.

As opposed to saying, oh well, maybe we could provide that later or the expert wasn't asked about it on cross-examination. So that's one of the reasons it ends up being long.

Certainly, on authoritative experts, the answer is an easy one for lawyers, which is to choose better experts, choose those experts who are actually authoritative in the field for which they are opining on.

For courts, I have more to say, of course, because I can blame them for being responsible, unlike us lawyers. In my experience, there's a lot of reluctance on the part of judges to completely exclude evidence that does not meet the requirements for authoritative experts.

So what I mean by that is that an expert report, which is from someone who's found not to be a proper expert or not to meet the other requirements and the laws of evidence, should have their report completely stricken from the application record.

And in fact, I believe it would be excluded on appeal, or at least would be subject to a finding that it is completely inadmissible.

What is much more common is that the decision-maker will simply say, well, I won't exclude the evidence entirely, but I'll just factor in what you've told me into the weight I assigned to that evidence. So that dynamic, although I understand why decision-makers don't want to expend the energy and time on making a more difficult decision about admissibility.

You can see how that dynamic inevitably ends up in just pushing to put in the most marginal expert report that you can. If you know that, in fact, regardless of how irrelevant it is, regardless of how unauthoritative it is, the decision-maker is going to read it, and it's going to be in their mind, and you'll be able to refer to it in your factum.

You still have an incentive to do so. So even if we can't change the substantive practice of how judges respond to arguments about admissibility once you get to the hearing. One procedural change we could make would be for the court to allow more preliminary motions on these issues.

So, for example, I'm thinking of it from the respondent's side, which of course, is my practice usually. If the applicants lead an expert report which we think is admissible, we could go bring a motion and have it struck out on a preliminary basis so that we don't even need to respond.

And unfortunately, there's quite a bit of case law discouraging that practice. Largely from a court resources perspective. You have to go to court at some point with this giant pile of paper; why not just have the judge who will see it later sorted out as opposed to taking up a motion day in a busy Toronto courthouse.

But the result is that again, coming from a perspective of avoiding risk, is that the parties have to respond to that evidence, even if it may be struck out later. Because they can't know for certain whether it will be or won't be.

So, for example, in the Supreme Court hearing in the commode case, it dealt with totally inadmissible, historical expert reports about the intentions of the fathers of confederation. And one of the Supreme Court judges said to the government side, well, why did you lead one of these reports which you've told me you know is inadmissible?

And that lawyer's answer was, well, the other side put in a report like that. And we told the judge we thought it was admissible, but we were unsuccessful. So we had to respond in kind. So allowing more preliminary motions of that basis.

Although it's more work in the short term for the judiciary, you know I think would be of a benefit to the parties over the life of the challenge, because it would really narrow down the record to the most helpful and authoritative expert, as opposed to just creating an arms race as to what could be included later, given some degree of weight and so on.

Cheryl M.: Well, and I think in the end, I feel for judges who have to go through these thousands and thousands of pages and trying to determine weight.

And I mean, they almost need a Ph.D. in social science, social sciences in order to understand some of these studies. But I think I'm very much in agreement with you about trying to put forward the best evidence that we possibly can, instead of having our decisions based on really shaky grounds.

So thank you very much, Padraic, for this; I think it gives our listeners just a little window on the practice piece of this and all of the strategy that has to go into a constitutional challenge.

We could probably talk at great length about the social science evidence, and maybe we will on a future program. But I want to thank you very much for coming in and chatting with us today.

Padraic R.: My pleasure. And I would encourage any of your students or anyone else who's interested in this area to try and get their eyes on an evidentiary record from a constitutional challenge in Ontario.

Unfortunately, they aren't that easy to find online; the court doesn't publish them. But oftentimes, the litigants themselves will publish a complete application record in support of their cause.

And given that students typically only read appellate decisions, I always think it's very helpful for people to read through what an actual record looks like.

And in fact, if they can consult one where they have an appellate decision in hand, then they can trace the evolution from that very early stage to what ultimately happens later on.

Cheryl M.: Excellent idea, thank you so much.

Padraic R.: Thank you.

Cheryl M.: Thank you, Padraic, for your wonderful insight and for joining us on our very first practice corner. Thank you, listeners, for tuning in to the first episode of charter a course. Where we dug into the law and practice underlying the reasonable limits clause of section one of the charter.

We are incredibly grateful to have learned from Professor Jacob Weinrib and Padraic Ryan about the history and purpose of the limitation clause and the evidentiary requirements inherent in section 1 charter litigation.

Looking ahead, we will be examining other sections of the charter, such as an episode on section 11 focused on jury selection with our guests Christa Big Canoe and Professor Kent Roach.

You'll be able to find that episode on apple podcasts, Spotify, and other popular platforms, as well as on the ask percenter website, so check back in soon. And lastly, we'd like to thank our podcast sponsor, without whom this show would not be possible.

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